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November 10, 2017

By ECF and Hand Delivery

The Honorable Edgardo Ramos
United States District Judge
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

***Kraft Foods Group Brands LLC* v. *Bega Cheese Ltd.*, No. 1:17-cv-08104 (S.D.N.Y.)**

Dear Judge Ramos:

We write on behalf of Petitioner Kraft Foods Group Brands LLC ("Kraft") in response to yesterday's letter filed by counsel for Bega Cheese Limited ("Bega"), which seeks a pre-motion conference concerning a proposed motion to dismiss Kraft's Petition to Compel Mediation and Arbitration (the "Petition"). We respectfully submit that Bega's letter is yet another attempt to delay the dispute resolution process that Bega is obligated to engage in by the contract Bega purchased—an obligation that Bega does not deny. Bega's motive is clear: as noted below, even as Bega attempts to evade the dispute resolution process, it has embarked on an extensive advertising campaign in Australia that is causing irreparable injury to Kraft's intellectual property rights and

makes unfair use of Kraft's trade dress. Because Bega now concedes that it is obligated to comply with the dispute resolution procedures, we respectfully submit that the Court should direct Bega to commit in writing to participate in mediation and arbitration in good faith, and that if Bega refuses to do so, the Court should schedule a hearing on the Petition as soon as possible.

Bega's letter does not deny that as the assignee of rights under the Master Ownership and License Agreement Regarding Trademarks and Related Intellectual Property (the "Agreement"), it also has assumed certain obligations under the Agreement, including the obligation to comply with its dispute resolution process. *See Tanbro Fabrics Corp.* v. *Deering Milliken, Inc.*, 35 A.D.2d 469, 471 (1st Dep't 1971) ("[T]he assignee of a contract acquires the rights of the assignor therein and assumes its obligations including an agreement to arbitrate."). And Bega presents no reason why the dispute resolution process should not commence forthwith. Instead, Bega attempts to delay this proceeding by focusing on three untenable propositions:

First, Bega argues that Kraft never notified Bega of its intention to mediate and arbitrate pursuant to the dispute resolution procedures of the Agreement. (Bega Ltr. at 2-3.) But in its letter dated September 27, 2017, Kraft expressly notified Bega that:

> *[W]e wish to move forward with the dispute resolution procedures under the Agreement*. Specifically, in accordance with Section 7.2 of the Agreement, we propose that we attempt to resolve the dispute by mediation.
>
> Please advise whether you have any preference in relation to the selection of possible mediators. We will shortly advise you of our selection. If the dispute is not resolved within 45 days, we reserve our right to commence arbitration proceedings against Bega under Section 7.3 of the Agreement.

(Ex. C to the Declaration of Sabrina Hudson (Doc. 3); emphasis added.) And when Bega refused to participate in dispute resolution—indeed, it sent a letter making the baseless claim that it was not bound by the relevant portions of the Agreement—Kraft was forced to file this action seeking to compel Bega to join the process. It is inconceivable that Bega was unaware of Kraft's intentions when it received our Petition, which specifically requests that Bega be compelled "*to participate in mediation and arbitration as required by the arbitration clause*." (Petition at ¶ 5; emphasis added.)

Second, Bega claims that it never refused to comply with the Agreement's dispute resolution procedures. (Bega Ltr. at 2-3.) But in its October 5, 2017 response to Kraft's letter, Bega unequivocally declared that it "*is not aware of any basis on which it is required to comply with the dispute resolution provisions of that Agreement.*" (Ex. D to

Doc. 3; emphasis added.) That letter directly contradicts the representations Bega makes in yesterday's letter.

And, if Bega was willing all along to comply with the Agreement in good faith, why didn't its Australian or American representatives tell that to Kraft as soon as it received the Petition on October 21, 2017? A simple phone call would have sufficed. Instead of acting in good faith, Bega sat silent for nearly three weeks, and only now—when faced with the prospect of an expedited hearing on Kraft's Petition—does it write to claim that it had no idea that Kraft was seeking to mediate and arbitrate the dispute. Further, while Bega cites certain cases that it claims support the proposition that the notice provided by Kraft, and Bega's response thereto, are insufficient to warrant a petition to compel arbitration, none of those cases bears any resemblance to the facts here.[1]

Third, Bega maintains that it is entitled to move to dismiss the Petition. But "a petition to compel arbitration is a motion, not a pleading." *Nat'l Union Fire Ins. Co. of Pittsburg* v. *Beelman Truck Co.*, 203 F. Supp. 3d 312, 316 n.4 (S.D.N.Y. 2016). Accordingly, "Rule 12(b) does not apply to it." *Id.* Bega is free to oppose the Petition, it is not entitled to file a motion to dismiss. Its request for motion practice is, we submit, but simply another effort to delay.

The reason for Bega's delaying tactics is clear. During the pendency of the Petition, Bega has launched a new television and radio advertising campaign that seeks to mislead consumers and misappropriate the extensive goodwill in the KRAFT brand by, among other things, claiming that "KRAFT peanut butter is now Bega peanut butter." In aid of the dispute resolution process, as provided under Section 7.4 of the arbitration clause, Kraft has filed an application in the Federal Court of Australia that seeks to halt this advertising campaign. In that application, Kraft has informed the Australian court that there is an additional dispute concerning Bega's misuse of Kraft's trade dress and other intellectual property that is the subject of proceedings in this Court.

Any further delay of the resolution of this dispute is particularly unwarranted considering that Bega does not and cannot contest that the Agreement contains a valid arbitration clause with which it is obligated to comply, and that there is no rational basis for Bega to dispute that the claim at issue falls within the scope of the arbitration clause, which is broad and encompasses "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof." (Agreement § 7.1.)

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[1] *See, e.g.*, *Jacobs* v. *USA Track & Field*, 374 F.3d 85 (2d Cir. 2004) (petitioner filed petition to compel arbitration even though respondent had already agreed to arbitrate the dispute); *Empresa Generadora De Electricidad Itabo* v. *Corporacion Dominicana De Empresas Electricas Estatales*, No. 05 CIV 5004 RMB, 2005 WL 1705080 (S.D.N.Y. July 18, 2005) (plaintiff sought to compel arbitration even though defendant had "actively participated in the arbitration"); *N. Am. Tech. Servs., Inc.* v. *RAE Sys. Europe APS*, No. 3:09-CV-1199 CFD, 2009 WL 5217979, at *1 (D. Conn. Dec. 29, 2009) (after failing to reach respondent by phone, petitioner filed petition to compel arbitration on the same day without waiting for respondent to respond).

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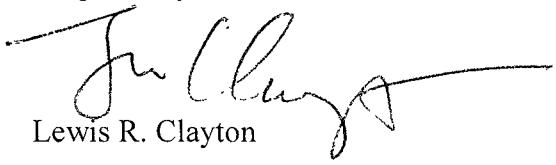
Given Bega's acknowledgment that it is bound by the Agreement's dispute resolution process, its professed willingness to comply with those procedures, and its repeated efforts to evade and delay mediation and arbitration, we respectfully request that the Court direct Bega to commit forthwith in writing that the specific dispute identified in in the Petition "aris[es] out of or relat[es] to [the] Agreement," that the dispute therefore is subject to the dispute resolution process in the Agreement, including mediation and (if mediation is unsuccessful) arbitration, and that Bega will immediately participate in good faith in that process.

Unless and until Bega so agrees, we respectfully submit that the Court should proceed to act on Kraft's Petition as soon as possible.

Respectfully submitted,



Lewis R. Clayton

cc: Fran M. Jacobs, Esq. (via ECF)